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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND BRANCH

DESIREE STEPHENSON, MARNI HABER, and KARVA TAM, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

NEUTROGENA CORPORATION,

Defendant.

No. C 12-00426 PJH

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: August 21, 2013
Hearing Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that, pursuant to an Order of the Court filed February 27, 2013, on August 21, 2013, at 9:00 a.m., or as soon thereafter as counsel may be heard, at the United States Courthouse, Oakland Courthouse, Courtroom 3, 3rd Floor, 1301 Clay Street, Oakland, California 94612, before the Honorable Phyllis J. Hamilton, United States District Court Chief Judge, Desiree Stephenson, Marni Haber, and Karva Tam ("Plaintiffs"), on behalf of the proposed Class, will and hereby do move for entry of an order: (i) granting final approval of the proposed settlement set forth in the class action Stipulation of Settlement; and (ii) confirming certification of the Settlement Class as defined in the Stipulation of Settlement.[1]

Plaintiffs' motion is based on the attached Memorandum of Points and Authorities in Support of Final Approval of Class Action Settlement; the Declaration of Mark N. Todzo in Support of Plaintiffs' Motions for Final Approval of Class Action Settlement and Attorneys' Fees and Costs ("Todzo Decl.") and the Declarations and exhibits attached thereto; the Stipulation of Settlement filed on December 20, 2012; all other pleadings and matters of record; and such additional evidence or argument as may be presented at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Plaintiffs Desiree Stephenson, Marni Haber, and Karva Tam, on behalf of the proposed Class, respectfully apply to this Court for entry of an order: (i) granting final approval of the proposed Settlement preliminarily approved by the Court; and (ii) confirming the certification of the Settlement Class preliminarily approved by the Court.

The proposed settlement resolves the claims in the operative Second Amended Complaint in this case. In that Complaint, Plaintiffs allege that Defendant Neutrogena Corporation's ("Neutrogena") allegedly engaged in false and misleading marketing and advertising of its Neutrogena Naturals line of cleansers and moisturizers. The lawsuit alleges that six of these products are not, contrary to Neutrogena's labeling and advertising, made of all natural ingredients and, in fact, contain petrochemicals. The settlement remedies the concerns expressed in the lawsuit Plaintiffs filed on behalf of all purchasers of these products, who allegedly paid a premium for them over comparable products that did not purport to be natural or free of petrochemicals. As discussed below, the proposed settlement gives class members precisely the relief that Plaintiffs sought when they filed the Complaint – it requires Neutrogena to change its product labeling and advertising, and provides class members with cash payments that represent a significant percentage of the price premiums alleged in the Complaint.

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[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation of Settlement filed on December 20, 2012. Doc. No. 45, Exh. 1 ("Stipulation of Settlement").

The proposed settlement is fair, reasonable, and adequate, falling well within the range of class action settlements that merit final approval. First and foremost, this settlement will prevent future violations by requiring Neutrogena to change its product labeling by, among other things, listing the exact percentage of natural ingredients on the ***front*** of every Naturals label and product package. In addition, Neutrogena will pay a total of $1,300,000 into a settlement fund for the benefit of Class members—which will be distributed to the class members via direct cash payments. Any unused or unclaimed funds will be distributed by the Rose Foundation for Communities and the Environment (the "Rose Foundation") to projects that the Rose Foundation determines (after a public, competitive, and transparent grant cycle) will benefit the class.

By making this substantial fund available and requiring changes to Neutrogena's labels, the Settlement provides an immediate, significant and positive result for the Class. Neutrogena will also not oppose an application by Plaintiffs to this Court for a partial reimbursement of Plaintiffs' attorneys' fees and costs, not to exceed a total of $500,000.[2] In turn, Neutrogena will receive a release of all claims relating to the challenged marketing and advertising practices.

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[2] Plaintiffs' application for attorneys' fees and costs is set forth in the contemporaneously filed Motion for Award of Attorneys' Fees and Reimbursement of Costs and Expenses.

These settlement stipulations were reached after rigorous, informed negotiations between the parties and their experienced class action counsel, in a process that was overseen by a seasoned, neutral mediator.

The response of the Class overwhelmingly favors final approval of the Settlement. Following preliminary approval, notice was served in accordance with the Court-approved notice plan. The notice plan is estimated to have reached over 250 million individuals -- and it was unquestionably effective at reaching members of the Class: to date, there have been over 92,000 visits to the settlement website and over 12,000 claim forms have been received. Yet ***no objections have been filed***, and only one individual has elected to opt out of the Settlement. Class members may submit claim forms for another six weeks, through August 26, 2013.

The proposed Settlement easily satisfies the Ninth Circuit's test to determine whether a settlement is fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e). The factors analyzed in this Circuit to determine the fairness of a class action settlement are:

- the strength of plaintiffs' case;
- the risk, expense, complexity, and likely duration of further litigation;
- the risk of maintaining class action status throughout the trial;
- the amount offered in settlement;
- the extent of discovery completed, and the stage of the proceedings;
- the experience and views of counsel;
- the presence of a governmental participant; and
- the reaction of the class members to the proposed settlement.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982). Based on their evaluation of the facts and law, Plaintiffs and Class Counsel submit that the proposed Settlement should be finally approved by the Court. Class Counsel's belief that the Settlement is fair, reasonable and adequate is also supported by the certainty of a substantial recovery today versus the risks of no recovery at trial, past experience in other class actions, the limited funds available for settlement, and the disputes between the parties concerning damages and liability. Thus, Plaintiffs and Class

Counsel respectfully recommend that the Settlement be approved by this Court, which is clearly within the range of approvability under Rule 23.[3]

II. BACKGROUND

A. Procedural History

Defendant Neutrogena is a manufacturer, seller, and distributor of a line of skincare products known as Neutrogena Naturals (the "Products"), which are sold to consumers across the nation, including in California. Todzo Decl., ¶ 2. Neutrogena launched the Products in 2011. *Id.*, ¶ 3. Plaintiffs allege that they were induced to purchase the Products by Neutrogena's representations and claims that the Products are natural; in fact, Plaintiffs allege, the Products contain various artificial and synthetic ingredients. *Id.*, ¶ 4. Plaintiffs further allege that certain statements made by Neutrogena in marketing and advertising the Products, including that they contain "[n]o harsh chemical sulfates, parabens, petrochemicals, dyes, phthalates," are false and misleading. *Id.* Plaintiffs seek to represent a class of persons throughout the United States who, like themselves, purchased the Products at a price premium, erroneously believing them to be natural based on Neutrogena's representations. *Id.* The primary objectives of Plaintiffs' case are to: (1) require Neutrogena to halt its allegedly deceptive marketing and advertising practices (thereby protecting future purchases by Class members as well as future customers of the Products); and (2) to disgorge the premiums it allegedly obtained as a result of its misrepresentations (thereby compensating consumers for past wrongdoings). *Id.*

On January 26, 2012, Plaintiff Desiree Stephenson filed a Complaint against Neutrogena in the U.S. District Court for the Northern District of California. Todzo Decl., ¶ 5. The Complaint alleged (1) violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; and California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §

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[3] In reviewing this settlement under Rule 23, the settlement should be approved if it is within a "range of reasonableness," *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

1750 *et seq.*; and (2) breach of express warranty with regard to four Neutrogena Naturals "cleanser" products: the Purifying Facial Cleanser, Purifying Pore Scrub, Face and Body Bar, and Fresh Cleansing + Makeup Remover. *Id.* On March 28, 2012, Plaintiff Stephenson filed a First Amended Complaint alleging the same causes of action, but adding two additional Neutrogena Naturals moisturizer products: the Multi-Vitamin Nourishing Night Cream and Multi-Vitamin Nourishing Moisturizer. *Id.*

On July 27, 2012, the Court granted in part and denied in part Neutrogena's Motion to Dismiss, dismissing claims as to the five Products that Plaintiff Stephenson did not purchase and striking Plaintiff Stephenson's prayer for injunctive relief insofar as she did not adequately allege a risk of future injury. Todzo Decl., ¶ 6. However, the Court gave Plaintiff Stephenson leave to file an amended complaint to add allegations that she intends to purchase Neutrogena Naturals Products in the future if the alleged misrepresentations are corrected. *Id.* On October 26, 2012, Plaintiffs filed a Second Amended Complaint adding these allegations, and also adding Marni Haber and Karva Tam – two California residents who purchased the Products under the misguided belief that they were natural and contained no petrochemicals – as named Plaintiffs and putative Class representatives. *Id.* Neutrogena filed an Answer to that Second Amended Complaint on November 9, 2012. *Id.*

B. Settlement Discussions

Even prior to the Court's July 27, 2012 Order on Neutrogena's Motion to Dismiss, the parties had begun discussions regarding the underlying factual allegations and potential settlement options. Todzo Decl., ¶ 7. On August 7, 2012, the parties participated in a mediation with the Honorable Edward A. Panelli (Retired). *Id.* During the course of the mediation session and thereafter, Neutrogena provided Plaintiffs with vital information pertinent to the legitimacy and scope of Plaintiffs' claims, including sworn statements describing the composition and labeling of the Neutrogena Naturals products and the number of products sold to date. *Id.* at ¶ 8. These discussions and the mediation resulted in the settlement terms discussed below. *Id.* at ¶ 7. Although Neutrogena has numerous defenses to the underlying allegations and the basis for certifying the Class, in recognition of the risks of the litigation and the certain, significant costs of defending it, Neutrogena agreed to a settlement that will provide valuable benefits to the settlement Class.

C. Settlement Terms

In exchange for a release of all claims, Neutrogena has agreed to undertake several important remedial measures. First, Neutrogena has agreed to change its Products' labeling in ways that, Plaintiffs believe, addresses Plaintiffs' concerns as described in the Complaint. Second, Neutrogena will contribute $1.3 million into an independently-administered Class fund, which will be used to fund payments to users of the Products who, Plaintiffs contend, were misled by Neutrogena's past labeling practices—as well as to disseminate notice to the Class such that affected persons may avail themselves of this remedial monetary payment. Third, Neutrogena will pay for a portion of Plaintiffs' reasonable attorneys' fees and costs, not to exceed $500,000.

1. Neutrogena Must Change Its Labeling And Packaging.

In settlement of Plaintiffs' and the Class's claims, Neutrogena has agreed to change the labeling and, where applicable, packaging of all Products. Specifically, as described in the Settlement Agreement, Neutrogena will now include a statement regarding the exact percentage of the Product that is naturally derived on the ***front*** of the label and/or package of each Product, and will remove the term "petrochemicals" from the statement "No harsh chemical sulfates, parabens, petrochemicals, dyes, phthalates" on the Product labels. Stipulation of Settlement, ¶ III.A; *see also id.*, Exh. 1-H.

2. Neutrogena Must Contribute Substantial Sums To A Claim Fund To Compensate Class Members.

The Settlement Agreement also provides that Neutrogena will pay $1.3 million in cash to establish a fund (the "Claim Fund") for payment of Class member claims, and for the payment of certain notice and administration costs and expenses. Stipulation of Settlement, ¶ III.B. The Claim Fund is being administered by Garden City Group (the "Claim Administrator"), an independent, qualified company approved by the Court, which approved claims submitted by affected Class members in accordance with a specified procedure and subject to verification by the parties. Stipulation of Settlement, ¶¶ III.B.4, III.B.6, III.B.7; *see also id.*, Exh. 1-A. Class members who submit valid claims are eligible to recover up to $10 per member ($1 for each of the cleanser Products purchased (*i.e.*, Neutrogena Naturals Purifying Facial Cleanser, Purifying Pore Scrub, Face and Body Bar, Fresh Cleansing + Makeup Remover) and $2 for each of the moisturizer Products purchased (*i.e.*, Multi-Vitamin Nourishing Moisturizer, Multi-Vitamin Nourishing Night Cream)).[4] Stipulation of Settlement, ¶ III.B.3. Plaintiffs' investigation revealed alleged price premiums of $1.50 - $6.65 for these products over comparable non-"Naturals" products—and the payments provided by the proposed settlement represent a significant portion of the economic damages Plaintiffs believe were suffered by the class members. In fact, class members who submit claims will receive up to 67% (depending on the products purchased) of the total damages alleged in this case. Todzo Decl., ¶ 15. Equally important, class members were ***not required*** to provide receipts or proofs of purchase in order to submit a claim. Stipulation of Settlement, ¶ III.B.3. To qualify for a cash payment, class members only had to fill out a simple form listing the type and amount of products that they purchased—nothing else was required. *Id.*, Exh. 1-F.

The proposed settlement also includes important safeguards to ensure that notice and administration costs are capped – no more than $550,000 of the Claim Fund may be used to reimburse those costs reasonably and actually incurred by the Claim Administrator in connection with providing notice and administering claims. Stipulation of Settlement, ¶ III.B.2(a). As of June 30, 2013, the Claim Administrator has incurred $284,390.19 in administration fees and expenses, and will continue to incur fees and expenses through the remainder of the administration of the Settlement. Declaration of Jennifer M. Keough ("Keough Decl."), ¶ 23

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[4] The difference in compensation as between purchasers of the cleanser and moisturizer Products ($1 versus $2) simply reflects the fact that the moisturizer Products are more expensive.

(Todzo Decl., Exh. 3). Accordingly, approximately $1,015,609 is currently available and waiting to pay class members' claims.

3. Cy Pres Funds Will Be Administered by a Third Party Foundation in Order to Ensure the Closest Possible Nexus to the Goals of the Litigation and a Transparent Process for Distributing Funds to the Most Appropriate Cy Pres Recipients.

The Settlement Agreement allows no possibility of any Claim Fund monies reverting to Neutrogena. Following distribution to Class members, the remainder of the Claim Fund shall be distributed as *cy pres* to an appropriate vehicle to provide the next best use of compensation to Class members. Stipulation of Settlement, ¶ III.B.2(c).

In order to ensure that the remaining amounts in the Claim Fund will be used in a manner that will benefit the Class as directly as possible, the parties have selected the Rose Foundation to administer and distribute the remaining *cy pres* funds. Todzo Decl., ¶ 12. As several courts have recognized, the Rose Foundation is an appropriate third party to handle *cy pres* distibution. *See, e.g., In re Consumer Privacy Cases*, 175 Cal. App. 4th 545 (2009). The Rose Foundation is a third party charity that is dedicated to providing resources to communities so that they can participate effectively in civic affairs, consumer protection and environmental stewardship. Declaration of Tim Little ("Little Decl."), ¶¶ 2- 3 (Todzo Decl., Exh. 2). As discussed in detail in the Declaration of Tim Little, the Rose Foundation would utilize its capacity in administering *cy pres* funds and its 20 years of grantmaking experience to conduct a public, competitive and transparent grants cycle. *Id.*, ¶ 12. This process will only award grants to projects designed to ensure that consumers are informed about the nature of ingredients in the products that they purchase, such as whether products are "natural," and to promote truth-in-labeling and required warnings and disclosures as to consumer products. *Id.* The Rose Foundation will launch the Consumer Product Ingredients Fund within 90 days of receipt of funds from the Neutrogena *cy pres*. *Id.* at ¶ 11. All funds will be dedicated solely to fulfilling the goals of this litigation. The Consumer Product Ingredients Fund will be advised by a funding board of experts in consumer education and natural ingredients issues to help ensure the most strategic grant decisions.[5] *Id*. at ¶ 13.

After the funds have been disbursed, the Rose Foundation will supply the Court and the parties with a report describing the grants awarded and their conformity with the consumer products ingredients nexus. Little Decl., ¶ 14 (Todzo Decl., Exh. 2). In addition, the Rose Foundation will rigorously track the grantees throughout the life of their projects and provide a robust accountability mechanism. *Id*. at ¶ 13. This process is specifically designed to ensure the closest possible nexus between the use of these funds and the goals of this litigation, such that the most appropriate *cy pres* recipients are awarded the funds and the Class receives the greatest benefit.

D. Preliminary Approval and Notice to Settlement Classes

On February 27, 2013, this Court issued an order conditionally certifying the Class and preliminarily approving the Settlement. February 27, 2013 Revised Order Preliminarily Approving Class Action Settlement, Doc. No. 49. The Court found that the requirements of Fed. R. Civ. P. 23 were preliminarily satisfied, conditional certification was warranted, the Settlement appeared reasonable, and the Class Notice plan was sufficient. *Id*. The Court also approved the designation of the Garden City Group to serve as the Court-appointed Claim Administrator for the Settlement. *Id*.

Notice to the Class began in March 2013 pursuant to the Court-approved notice plan, which was determined by the Court to be "the best notice practicable under the circumstances" and constitutes "due and sufficient notice to all" Class members. February 27, 2013 Revised Order, Doc. No. 49, ¶ 12. First, the Claim Administrator provided notice via e-mail and U.S mail to over 7,000 Class members for whom it has contact information, and Neutrogena posted relevant links in the footer of its Neutrogena Naturals website that are viewable no matter what specific page of the website users access. Keough Decl., ¶¶ 11-17 (Todzo Decl., Exh. 3). Second, Neutrogena and the

[5] The Rose Foundation will retain a small percentage of the cy pres award, depending on the ultimate size of the award, to defray the cost of administering the grant program. Little Decl., ¶ 18 (Todzo Decl., Exh. 2)

Claim Administrator published notices in *People* and *Us Weekly* magazines and in the *San Francisco Chronicle* newspaper. *Id*., ¶¶ 6-7; *see also*, Declaration of Laura Mehaffey Regarding Publication of Short Form Notice (filed separately). The combined circulation of these publications is over 5 million, with a total audience of over 56 million readers. Keough Decl., ¶¶ 6-7 (Todzo Decl., Exh. 3). Third, press releases were sent to the PR Newswire service and to pertinent weblogs (a.k.a. "blogs") covering beauty supplies, cosmetics, and skin care issues. *Id*. at ¶ 10. The PR Newswire was disseminated nationwide and was subsequently rebroadcast by at least 465 news sources thereby increasing the potential reach of the Notice to consumers. *Id*. Fourth, internet and mobile phone advertisements targeting potential Class members were run on various media services, resulting in over 200 million delivered opportunities for potential Class members to click on the banner ad and view the settlement website. *Id*. at ¶¶ 8-9. All notices direct Class members to a settlement website and toll-free telephone support system, which were set up by the Claim Administrator using Class funds. *Id*. at ¶¶ 18-19. The website included a more detailed notice fully explaining the terms of the settlement and all attendant Class member rights both in English and Spanish. *Id*. at ¶ 18.

This notice program worked very well. Given that the Neutrogena Naturals products line was introduced to the market recently, in January 2011, the estimated class size is relatively small. *See* Todzo Decl., ¶ 3. Nevertheless, as of July 14, 2013, there have been a total of: (1) 92,451 visits to the Settlement website; (2) 769 calls to the toll-free number; and (3) 12,034 claim forms received. Keough Decl., ¶¶ 18, 19 & 22 (Todzo Decl., Exh. 3). Class members may submit claim forms for another six weeks, through August 26, 2013, and Plaintiffs will update the Court at the August 21, 2013 final settlement approval hearing as to the number of claims received to date. Further, pursuant to the Court's Order, the deadline for Class members to opt out of or object to the Settlement was July 5, 2013. To date, no Class Member has objected, and only a single individual has opted out of the Settlement. *Id*. at ¶¶ 20-21.

III. ARGUMENT

A. Standards for Judicial Approval of Class Action Settlements

It is well-established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice*, 688 F.2d at 625. Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome and the typical length of the litigation. "[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).[6]

In approving a proposed settlement of a class action under Federal Rule of Civil Procedure 23(e), the court must find that the proposed settlement is "'fair, adequate and reasonable.'"[7] The Ninth Circuit has provided a list of factors which may be considered in evaluating the fairness of a class action settlement:

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625; *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd sub nom.*, *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992).[8]

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[6] The law always favors the compromise of disputed claims, *Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986); including those asserted in stockholder class actions. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

[7] *Pac. Enters.*, 47 F.3d at 377; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

[8] Unless otherwise noted, all citations are omitted and emphasis is added.

The district court must exercise sound discretion in approving a settlement. *Torrisi*, 8 F.3d at 1375; *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). However, a strong initial presumption of fairness attaches to the proposed settlement if the settlement is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001). Therefore, in exercising its discretion, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the Court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original).

As explained below and in the Declaration of Mark N. Todzo, application of these criteria demonstrates that the Settlement warrants final Court approval.

B. The Strength of Plaintiffs' Case

The substantial injunctive and monetary relief secured by the settlement is quite fair in light of the significant hurdles faced by Plaintiffs and the Class going forward: Neutrogena vigorously disputes that Plaintiffs would be able to prove liability, certify a class, or be entitled to injunctive relief or monetary damages. Todzo Decl., ¶ 14. Although Plaintiffs believe that they could establish liability were the case to go to trial, this is hardly an easy win. As this Court has recognized, the term "natural" as used on cosmetic products has not been conclusively defined by state or federal regulatory agencies. *See, e.g., Astiana v. Hain Celestial Group, Inc.*, 2012 WL 5873585, No. C 11-6342 PJH (N.D. Cal. Nov. 19, 2012). In the absence of agency guidance, Plaintiffs would face the hurdle of establishing that Neutrogena's use of the term in labeling and marketing its Products is deceptive to a reasonable consumer based on more equivocal conceptions of the term. Notably, other plaintiffs have failed in bringing similar lawsuits alleging deception by so-called "natural" products. *Ibid*.

Furthermore, Plaintiffs note that this Court already granted in part Neutrogena's motion to dismiss on Article III standing grounds, which significantly pared down the operative claims in the case. Todzo Decl., ¶ 14. Although Plaintiffs believe that they have remedied these infirmities in the allegations of the Second Amended Complaint, the sufficiency of these allegations has yet to be challenged by Neutrogena or upheld by this Court. Todzo Decl., ¶ 14. These issues thus could rise up again at a later stage.

Lastly, Plaintiffs recognize that there is a lurking legal ambiguity regarding whether they will be able to represent a nationwide class in the wake of the Ninth Circuit's ruling in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 589-94 (9th Cir. 2012) (holding, under the facts of that case, that "common issues of law do not predominate because California's consumer protection statutes may not be applied to a nationwide class with members in 44 jurisdictions"). There is a split of authority among district courts as to the scope of this ruling. *Compare Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D. Cal. 2012) (refusing to decertify class in light of *Mazza*), *with Kowalsky v. Hewlett-Packard Co.*, 2012 WL 892427 (N.D. Cal. Mar. 14, 2012) (applying *Mazza* in denying motion for class certification). Plaintiffs are largely confident that this Court can and would certify a nationwide settlement Class under the facts of the case at bar, but acknowledge the discrete risk that the Court would not.

By settling now, Class members secure meaningful and significant monetary compensation, plus the certainty of knowing that Neutrogena's labeling and marketing practices will immediately change. These benefits will accrue equally to all Class members. *See* Todzo Decl. ¶¶ 14-17.

C. The Risk, Expense, Complexity and Likely Duration of Litigation Favor Settlement

To determine whether the proposed settlement is fair, reasonable and adequate, the Court must balance the continuing risks of litigation against the benefits afforded to Class Members and the immediacy and certainty of a substantial recovery. *Mego Fin.*, 213 F.3d at 458; *Girsh*, 521 F.2d at 157; *Boyd*, 485 F. Supp. at 616-17; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). In other words, "'[t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "[i]t has been held proper to take the bird in hand instead of a prospective flock in the bush.'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

The immediacy and certainty of a recovery is a factor for the Court to balance in determining whether the proposed settlement is fair, adequate, and reasonable. *E.g.*, *Girsh*, 521 F.2d at 157. Courts have consistently held that "[t]he expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Officers for Justice*, 688 F.2d at 626; *Boyd*, 485 F. Supp. at 616-17; *Bullock v. Adm'r of Estate of Kircher*, 84 F.R.D. 1, 10 (D.N.J. 1979). Thus, the benefit of the present settlement must be balanced against the expense of achieving a more favorable result at a trial in the future. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Approval of the Settlement will mean a present recovery for eligible claimants. If not for this Settlement, the case would have continued through another motion to dismiss, class certification, summary judgment and trial. *See* Todzo Decl., ¶ 17. A trial would have occupied a number of attorneys for many weeks and would have required substantial and costly expert testimony on both sides. Furthermore, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Therefore, delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Settlement of this litigation ensures a recovery, and eliminates the risk of no recovery at all. In sum, the risks posed by continued litigation are substantial, and they would be present at every step of the litigation if it were to continue.

D. Risk of Maintaining Class Action Status Throughout Trial

As discussed above, the Ninth Circuit's decision in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 589-94 (9th Cir. 2012), which questioned the viability of certifying a nationwide class under California's consumer protection and unjust enrichment laws, has a direct bearing on this case if it were to proceed in litigation. While Plaintiffs have not yet moved to certify the class, Neutrogena would certainly oppose certification, and the *Mazza* decision and subsequent case law may impact the size and parameter of any class Plaintiffs could certify. As certification remains unknown, this factor too weighs in favor of finally approving this Settlement.

E. Amount Offered in Settlement

Settlement by its nature is a compromise, therefore the law does not require a settlement to reflect the best possible result in the litigations, but rather only that it falls within the ambit of reasonableness. Fed. R. Civ. P. 23(e)(2). Here, Plaintiffs have secured a commitment from Neutrogena to implement injunctive relief that, Plaintiffs believe, fully cures the alleged misrepresentations at the heart of this case and protects consumers from future exposure to the alleged misrepresentations. *See* Todzo Decl., ¶ 11. The injunctive relief component of the settlement – which cannot be readily monetized, but which has tremendous value to consumers – enhances the legitimacy of this recovery. *See id*. at ¶¶ 11-12.

Additionally, $1.3 million monetary recovery represents a substantial percentage of what Plaintiffs believe to be their best case scenario for recovery at trial. Todzo Decl., ¶ 15. Class members who submit valid claims, without a requirement of proof of purchase, are eligible to recover up to $10 per member ($1 for each of the cleanser Products purchased and $2 for each of the moisturizer Products purchased). Stipulation of Settlement, ¶ III.B.3. The monetary provisions of the settlement were based on a damages model, as outlined in the Complaint that looked to the actual premiums paid by consumers on all Products sold nationwide over and above the prices paid by consumers for seemingly comparable cleanser and moisturizer products that do not claim to be "natural." Todzo Decl., ¶ 15. The $1 and $2 per unit reasonably represents between 30% to 67% of Plaintiffs' estimate of damages for the Products. *Id.*

As discussed above, the unclaimed portion of the Claim Fund shall be distributed as *cy pres* to appropriate non-profit or civic entities. Such funds would only be awarded to projects designed to ensure that consumers are informed about the nature of ingredients in the products that they purchase, such as whether products are "natural," and to promote truth-in-labeling, required warnings and disclosures as to consumer products. Little Decl., ¶ 12 (Todzo Decl., Exh. 2). These projects will be chosen and funded under strict supervision to maximize the benefits to the Class. *Id.* at ¶¶ 12-14.

The reasonableness of the settlement is further underscored by the fact that it was reached only after participation in formal mediation before a qualified, neutral mediator. *See Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008) (brokering of settlement by qualified mediator weighs in favor of preliminary approval of settlement by court). Here, the parties employed the Honorable Edward A. Panelli, a former Justice of the California Supreme Court with decades of experience in the resolution of complex business litigation, including class actions and products liability cases, as a mediator. *See* Todzo Decl. ¶ 7 & Exh. 1.

F. The Stage of Proceedings and the Amount of Discovery Completed

The stage of the proceedings and the amount of discovery completed is one of the factors that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Weinberger*, 698 F.2d at 74; *Ellis*, 87 F.R.D. at 18; *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

Although no formal discovery was conducted, Neutrogena did provide Plaintiffs with vital information pertaining to the legitimacy and scope of Plaintiffs' claims, including sworn statements confirming information regarding the formulation of Neutrogena's Naturals products and the number of Naturals products sold to date. Todzo Decl. ¶¶ 8 & 10; *see also, e.g.*, *In re Mego*, 213 F.3d at 459 ("[I]n the context of class actions settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement.") (citation omitted). This sharing of information ensured sophisticated and meaningful settlement negotiations, which were conducted over several months, including a face-to-face meeting with members of Neutrogena's internal legal team. *See* Todzo Decl. ¶¶ 7, 8 & 10. As a result, the Parties have a comprehensive understanding of the strengths and weaknesses of the case and have sufficient information to make an informed decision regarding the fairness of the settlement. *See Mego Fin.*, 213 F.3d at 459.

G. Experience and Views of Counsel

It has long been accepted that the view of the attorneys actively conducting the litigation, while not conclusive, "is entitled to significant weight" when evaluating a settlement. *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis*, 87 F.R.D. at 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight").

This action has been litigated and settled by experienced and competent counsel on both sides of the case. Plaintiffs' counsel are well known for their decades of experience and success in complex and class action litigation. Todzo Decl., ¶¶ 18-19 & Exhs. 4-5. Defense counsel are, likewise, extremely sophisticated and experienced litigators. That such qualified and well-informed counsel endorse the Settlement as being fair, reasonable, and adequate heavily favors this Court's approval of the Settlement.

H. Reaction of the Settlement Class

Another factor courts consider when determining whether to approve a settlement is the reaction of the class. *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). A "relatively small number" of objections is "an indication of a settlement's fairness." *Id.* (citing Herbert Newberg & Alba Conte, 2 NEWBERG ON CLASS ACTIONS §11.48 (3d ed. 1992)); *see also Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 5062697, at *6 (S.D. Ill. June 5,

2006) (nine objections is a "minuscule" amount). Concomitantly, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton*, 141 F. Supp. 2d at 906. As discussed in detail above and in the Keough Declaration, notice was widely disseminated via mail, e-mail, print, and electronic publication to all known Class members and millions of readers of various electronic and print publications. The Settlement Class members are well aware of the Settlement— as of July 14, 2013, there have been a total of: (1) 92,451visits to the Settlement website; (2) 769 calls to the toll-free number; and (3) 12,034 claim forms received. Keough Decl., ¶¶ 18, 19 & 22 (Todzo Decl., Exh. 3). Yet not a single Class Member has objected, and only one individual has requested exclusion from the Settlement. *Id*. at ¶¶ 20-21. Given the relatively smaller potential class size due to the fact that the Neutrogena Naturals products line was only introduced to the market in January 2011, the Notice process has been remarkably successful—and the Class's reaction to the proposed settlement has been overwhelmingly positive.

IV. CONCLUSION

For the reasons discussed herein and in the Todzo Declaration, Plaintiffs respectfully request that the Court approve the Settlement of this litigation as fair, reasonable, and adequate.

DATED: July 17, 2013

Respectfully submitted,

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